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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MARK ALAN MIRES, Appellant.	)	2 CA-CR 2011-0074 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094421001

Honorable José H. Robles, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Linley Wilson — Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Alex D. Heveri — Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 Mark Mires, who had been the passenger in a vehicle, was arrested after driving away in that vehicle after the original driver had been involved in an accident with another vehicle. Mires stipulated that at the time of the incident his license to drive

had been suspended, he had been "under the influence of alcohol and impaired for the task of driving," and his blood alcohol content (AC) had been .08 or more.

¶2 After a jury trial, Mires was convicted, as charged, of two counts of aggravated driving under the influence (DUI) and two counts of aggravated driving with an AC of .08 or more. The trial court imposed an enhanced, presumptive, ten-year prison term on each count, to be served concurrently with one another. On appeal Mires contends his due process rights were violated when "the court failed to strike two jurors for cause, . . . arbitrarily depriv[ing] him of his full use of preemptory challenges." Finding no error, we affirm.

¶3 Relying on *State v. Sexton*, 163 Ariz. 301, 787 P.2d 1097 (App. 1989), Mires argues the trial court violated his due process rights by "arbitrarily depriv[ing] him of the full use of peremptory challenges under state law." In *Sexton* another department of this court concluded that, under Arizona law, "the right to peremptory challenges is so substantial that forcing a party to use a peremptory challenge to strike potential jurors who should have been stricken for cause denies the litigant a substantial right." *Id.* at 303, 787 P.2d at 1099. The court therefore concluded that a trial court's error in refusing to strike a potential juror for cause was not harmless error. *Id.* Thereafter, citing *Sexton*, our supreme court adopted a similar rule, determining that "when a trial judge erroneously denies a challenge for cause, reversal is required even if the challenging party does not independently show that a biased juror sat on the case." *State v. Huerta*, 175 Ariz. 262, 264, 855 P.2d 776, 778 (1993), *overruled by State v. Hickman*, 205 Ariz. 192, 68 P.3d 418 (2003).

¶4 Thereafter, however, our supreme court overruled *Huerta* and adopted a rule "requir[ing] a showing of prejudice before a case will be reversed when a defendant

uses a peremptory challenge to remove a juror the trial court should have excused for cause." *Hickman*, 205 Ariz. 192, ¶¶ 20–21, 68 P.3d at 422. And, contrary to Mires's assertion here, "a defendant is required to use an available peremptory strike to remove an objectionable juror whom the trial court has refused to remove for cause" if he wishes to maintain any error was prejudicial, and thereby preserve his claim for appeal. *State v. Rubio*, 219 Ariz. 177, ¶ 12, 195 P.3d 214, 218 (App. 2008). Furthermore, a defendant does not demonstrate prejudice by a mere showing that the trial court's error consumed one of his peremptory strikes. *See Hickman*, 205 Ariz. 192, ¶ 34, 68 P.3d at 426. Rather, Mires must demonstrate that, notwithstanding his use of all available peremptory strikes, he was deprived of a "fair and impartial" jury. *Id.* ¶ 41. Mires has articulated no objection to any of the jurors who deliberated in his case. Because he has not demonstrated any cognizable prejudice arising from the trial court's ruling, even if it had been erroneous, he is not entitled to relief.

¶5 Mires's convictions and sentences are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge